

THE INTERPRETIVE DIMENSION OF *SEMINOLE ROCK*

*Kevin M. Stack**

INTRODUCTION

A lively debate has emerged over the merits and scope of application of a long-standing doctrine governing the deference a court accords an agency's interpretation of its own regulations. That doctrine, traditionally associated with *Bowles v. Seminole Rock & Sand Co.*¹ and now more frequently attributed to *Auer v. Robbins*,² states that a court must accept an agency's interpretation of its own regulations unless the interpretation is "plainly erroneous or inconsistent with the regulation."³ In recent years, Justice Antonin Scalia has issued separate opinions calling for the doctrine to be reconsidered and abandoned.⁴ Chief Justice John Roberts, Justice Samuel Alito, and Justice Clarence Thomas have also announced their openness to reevaluating the doctrine.⁵

* Professor of Law and Associate Dean for Research, Vanderbilt University Law School. For comments and suggestions on earlier drafts, I am grateful to the participants in this Conference and preceding roundtable discussion, and especially to Jonathan Adler, Caroline Cecot, Sanne Kudsén, Neomi Rao, Kip Viscusi, and Amy Wildermuth.

¹ 325 U.S. 410 (1945).

² 519 U.S. 452 (1997). This doctrine was traditionally associated with *Seminole Rock*, but since 1997 the Supreme Court and other courts have frequently attributed it to *Auer*. See, e.g., *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2265-66 (2011) (Scalia, J., concurring) (noting that the *Seminole Rock* doctrine has recently been attributed to *Auer*, despite the fact that *Auer* involved a straightforward application of *Seminole Rock* (see *Auer*, 519 U.S. at 461 (relying on *Seminole Rock* with little ado))). This Article generally refers to the doctrine as *Seminole Rock* or *Seminole Rock/Auer*, but following judicial practice does not make a distinction between *Seminole Rock* and *Auer*.

³ *Auer*, 519 U.S. at 461 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Seminole Rock*, 325 U.S. at 414) (internal quotation marks omitted)). Three justices have indicated an interest in reconsidering this doctrine. See *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring) (joining with Justice Alito in noting that "[i]t may be appropriate to reconsider" *Seminole Rock/Auer* in another case); *id.* at 1339, 1342 (Scalia, J., concurring in part and dissenting in part) (urging the Court to overturn *Seminole Rock/Auer*).

⁴ See *Decker*, 133 S. Ct. at 1342 (Scalia, J., concurring in part and dissenting in part) (urging the Court to overturn *Seminole Rock/Auer*); *Talk America*, 131 S. Ct. at 2265-66 (Scalia, J., concurring) (criticizing the doctrine and announcing his interest in reconsidering it); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring) (urging overruling of *Auer*).

⁵ See *Decker*, 133 S. Ct. at 1338 (Roberts, C.J., concurring) (noting that "[i]t may be appropriate to reconsider" *Seminole Rock/Auer* in another case); *Perez*, 135 S. Ct. at 1225 (Thomas, J., concurring) (stating that "the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered"); cf. *The Supreme Court 2011 Term: Fair Labor Standards Act of 1938 Auer Deference*: Christopher v. SmithKline Beecham Corp., 126 HARV. L. REV. 176, 357-58 (2012) (noting increasing scrutiny of the doctrine).

As these justices have expressed an interest in reconsidering *Seminole Rock*, the Supreme Court has clarified the scope of the doctrine's application. First, in *Gonzales v. Oregon*,⁶ the Court made clear that if a regulation merely repeats statutory language, the agency's interpretation of that repeated language does not qualify for deference under *Seminole Rock*.⁷ Second, in *Christopher v. SmithKline Beecham Corp.*,⁸ the Court declined to accord deference to an agency interpretation in an amicus brief, and did so in a way that called into question whether the Court would continue treating agency briefs as worthy of receiving deference under *Seminole Rock*.⁹

Further narrowing of *Seminole Rock*'s application seems likely given the disjuncture in the scope of application of *Seminole Rock* and *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*¹⁰ created by the Supreme Court's decision in *United States v. Mead Corp.*¹¹ In *Mead*, the Court constricted the application of *Chevron* deference to statutes that grant lawmaking authority to the agency and to agency actions exercising that authority.¹² Under *Mead*, notice-and-comment rulemaking is presumptively eligible for *Chevron* deference, whereas guidance documents and litigation briefs are not.¹³ In contrast, under *Seminole Rock*, an agency's interpretation of its own regulation in a guidance document or litigation brief still generally qualifies for deference.¹⁴ In an appropriate case, it would not take a grand leap for the Supreme Court to bring the scope of *Seminole Rock*'s application in line with *Chevron*'s, as commentators have advocated.¹⁵ Moreover, the careful research by Professors Amy Wildermuth and Sanne Knudsen on the transformation of the Court's decision in *Seminole Rock* into a free-

⁶ 546 U.S. 243 (2006).

⁷ *See id.* at 257 ("An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.").

⁸ 132 S. Ct. 2156 (2012).

⁹ *See id.* at 2170-73.

¹⁰ 467 U.S. 837 (1984).

¹¹ 533 U.S. 218 (2001).

¹² *Id.* at 226-27.

¹³ *Id.* at 229.

¹⁴ *See, e.g.,* *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567, 2575 n.3 (2011) (according *Auer* deference to a litigation brief of the United States); *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 883-84 (2011) (rejecting the argument that an agency amicus brief was not entitled to deference under *Auer*, and according deference to the interpretation contained in the brief); *but see* *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (denying *Auer* deference to an agency litigation brief).

¹⁵ Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 900 (2001) ("*Seminole Rock* deference should at a minimum be subject to the same limitations that apply to the scope of *Chevron* deference."); Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1484-96 (2011) (arguing that *Mead*'s logic for constraining *Chevron*'s scope of application extends to *Seminole Rock*).

standing, generally applicable doctrine reveals other lines for reevaluating the doctrine's scope of application.¹⁶

The reappraisal of *Seminole Rock* by jurists and scholars has, however, largely neglected the underlying question of the method a court employs to interpret a regulation—that is, the method of regulatory interpretation. When a court evaluates an agency's interpretation of its own regulation under *Seminole Rock*, it still must adopt some method of interpreting the regulation to assess whether the agency's action is “plainly erroneous or inconsistent with the regulation.” Does the court make that determination of consistency by evaluating the regulation's text alone or in view of other considerations? What interpretive tools does it invoke? Merely specifying that *Seminole Rock* applies neither resolves the question of interpretive approach nor obviates the need for it.

In other contexts, it is widely acknowledged that a framework of review requires adopting an interpretive approach. For instance, a court cannot apply *Chevron* to assess the validity of agency action under a statute without adopting an approach to statutory interpretation. The point is an analogous one here: a court cannot assess the validity of agency interpretations of their own regulations without adopting (at least implicitly) a method of regulatory interpretation. Indeed, the need for an approach to interpretation holds regardless of the standard of review that applies. If a court were to invoke a less deferential standard of review to agency constructions of their own regulations, such as that of *Skidmore v. Swift & Co.*,¹⁷ as some commentators have advocated and the Supreme Court has on occasion applied,¹⁸ the court would even more clearly need to adopt an approach to regulatory interpretation. To put this basic point in more general terms, a framework of review of the validity of an agency's interpretation of its own regulations has two important dimensions: the standard of review and the method of interpreting the regulation.¹⁹

¹⁶ See Sanne H. Knudsen & Amy J. Wildermuth, *Lessons from the Lost History of Seminole Rock*, 22 GEO. MASON L. REV. (forthcoming 2015).

¹⁷ 323 U.S. 134 (1944).

¹⁸ See, e.g., *SmithKline Beecham*, 132 U.S. at 2169 (applying *Skidmore* to review an agency's interpretation of its own regulation); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 686-87 (1996) [hereinafter Manning, *Constitutional Structure*] (arguing for adoption of the *Skidmore* standard).

¹⁹ Another dimension that is not as critical for present purposes is the *timing of reasons*. The timing of reasons concerns whether the court will uphold the agency's position for any reasons given, even those offered *post hoc* in litigation, or whether the court will uphold the agency's action only for reasons that the agency itself provided at the time it acted. This dimension is binary: uphold for any conceivable reason versus uphold only for reasons relied upon by the actor at the time of acting. In general, courts will uphold agency action only for reasons upon which the agency relied at the time it acted. See *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) (“[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.”).

This Article argues that a court's choice of interpretive method may be just as important, if not more important, to the outcome of review of the validity of an agency's interpretation of its own regulations as the standard of review the court applies. That is, deference to the agency's interpretation of its own regulations may be as much a function of the court's choice of interpretive method as the standard of review it adopts. If the framework of review is a problem with two dimensions—the standard of review and the interpretive method—then there is reason to evaluate the likely effects of different methods of regulatory interpretation. That investigation promises to shed light on the ways in which particular interpretive methods are likely to be more or less deferential to agency actions, as well as on the level of notice those methods provide the public of the regulation's meaning.

The distinctive legal character of notice-and-comment regulations issued under the Administrative Procedure Act (“APA”)—that they must be accompanied by an explanatory statement of their purpose, a statement of “basis and purpose,”²⁰ to be procedurally and substantively valid—holds interesting implications for this interpretive question. In particular, building on my other writing on regulatory interpretation,²¹ this Article argues that interpreting regulations in light of these explanatory statements, frequently referred to as a regulation's “preamble,” results in a narrower range of acceptable readings of the regulation, and offers greater notice of the regulation's meaning than looking to the regulatory text alone. As a result, this method of regulatory interpretation, which this Article calls regulatory purposivism, holds promise for addressing many of the concerns raised by *Seminole Rock*, whether or not the Supreme Court decides to overrule the doctrine.

I. SEMINOLE ROCK AND ITS CHALLENGES

Administrative agencies frequently offer interpretations of their own regulations, whether in adjudicative decisions, guidance documents, the preambles to the regulations, opinion letters, or briefs. Firm numbers on the volume of guidance documents and agency adjudications are hard to find,

²⁰ 5 U.S.C. § 553(c) (2012).

²¹ Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 357 (2012) (highlighting the lack of attention to regulatory interpretation and proposing a textually constrained purposive theory of regulatory interpretation). In this symposium contribution, the focus is on how the method of regulatory interpretation defended in *Interpreting Regulations*, *supra*, applies in the context of *Seminole Rock*; the timing of this contribution did not permit engagement with Professor Jennifer Nou's forthcoming article *Regulatory Textualism*, 64 DUKE L.J. (forthcoming 2015), which thoughtfully joins the debate over the proper methodology of for interpreting regulations. Professor Nou takes issue with aspects of the interpretive approach defended in *Interpreting Regulations*, and argues for a form of regulatory textualism that emphasizes those sources most likely to contain sincere, not strategic, statements of the terms of agreement with the agency's political principals.

but most estimates take the volume of guidance to substantially exceed that of regulations,²² and the dockets of administrative tribunals to tower over those of the federal courts.²³ Not every guidance document or agency adjudication interprets the agency's own regulations. Some interpret the statutory framework directly, for instance. But when disputes about regulatory interpretation make their way to court, the courts are typically faced with an agency's own interpretation of the regulation, either because the agency is a party to the dispute or has issued a freestanding interpretation. As a result, for courts, the business of regulatory interpretation often involves addressing an agency's interpretation of its own regulations.

For some time,²⁴ the doctrine associated with *Seminole Rock* and *Auer* has defined review of agencies' interpretations of their own regulations. *Seminole Rock/Auer* states a standard of review—that an agency's interpretation of its own regulation is “controlling unless ‘plainly erroneous or inconsistent with the regulation.’”²⁵ As explained in other writing,²⁶ the *Seminole Rock/Auer* line of authority provides some guidance on how a court is to judge whether an agency's interpretation of its regulations is permissible, but judicial practice has not been consistent. In *Seminole Rock*, the Court advised that its “tools . . . are *the plain words of the regulation* and any relevant interpretations of the Administrator.”²⁷ A strain of precedent relies primarily on the plain meaning of the regulation. In *Auer*, for instance, the Court upheld the Secretary of Labor's interpretation of the department's own regulations based primarily on dictionary definitions of the critical regulatory phrase (“subject to”).²⁸ Likewise, in *Christensen v. Harris County*,²⁹ on the basis of

²² See Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 398 (2007) (noting the volume of guidance exceeds that of notice-and-comment rules); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1468-69 (1992) (noting that the volume of guidance of the Internal Revenue Service, Federal Aviation Administration, and Nuclear Regulatory Commission all vastly outnumber their respective formal regulations).

²³ Compare SSA Administrative Data: Hearings and Appeals, SOC. SEC. ADMIN., at tbl. 2.F9 (2013), <http://www.ssa.gov/policy/docs/statcomps/supplement/2013/2f8-2f11.pdf> (showing that the Social Security Administration received 849,869 hearing requests in 2012 alone), with Judicial Caseload Indicators, U.S. COURTS.GOV, <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/judicial-caseload-indicators.aspx> (last visited Jan. 12, 2014) (showing that in federal courts in 2013, 56,475 appeals were filed, 284,604 civil cases were filed, and 91,266 criminal cases were filed).

²⁴ See Knudsen & Wildermuth, *supra* note 16 (exploring the doctrine's development).

²⁵ See *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))).

²⁶ See Stack, *Interpreting Regulations*, *supra* note 21, at 372-73.

²⁷ *Seminole Rock*, 325 U.S. at 414 (emphasis added).

²⁸ *Auer*, 519 U.S. at 461 (citing definitions from two dictionaries to support the conclusion that the phrase “comfortably bears the meaning the Secretary assigns”); see also, e.g., *Sec'y of Labor v. W. Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) (looking to ordinary usage and the *Merriam-Webster Dictionary* definition to determine the meaning of “supervisory”).

²⁹ 529 U.S. 576 (2000).

the text alone, the Court rejected an agency's construction of a regulation.³⁰ The Court, however, has not justified this particular emphasis on plain meaning, and courts continue to invoke other interpretive tools in determining whether an agency's construction is permissible.³¹ The Supreme Court has relied on "the Secretary's intent at the time of the regulation's promulgation,"³² canons of statutory construction,³³ statutory language and purpose,³⁴ the consistency of the agency's interpretation over time,³⁵ the regulation's own procedural history,³⁶ and the consistency with the agency's statement of basis and purpose.³⁷ In these and other decisions under *Seminole Rock*, the Court pays little attention to the interpretive methods it invokes; it does not

³⁰ *Id.* at 587-88 ("The regulation in this case, however, is not ambiguous—it is plainly permissive. To defer to the agency's position would be to permit the agency . . . to create *de facto* a new regulation."); see also *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 878-80 (2011) (finding the regulation ambiguous based on text alone); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 514 (1994) ("The regulation provides, in unambiguous terms, that the 'costs' of these educational activities will not be reimbursed when they are the result of a 'redistribution,' or shift, of costs from an 'educational' facility to a 'patient care' facility . . .").

³¹ See Stack, *Interpreting Regulations*, *supra* note 21, at 372-74 (citing examples of this methodological diversity).

³² *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988); see also *Thomas Jefferson Univ.*, 512 U.S. at 512.

³³ *E.g.*, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007) (invoking a presumption that "the specific governs the general" and citing statutory authorities in which specific statutory preemption provisions trumped general savings provisions, and specific statutory sentencing provisions trumped general ones).

³⁴ See, *e.g.*, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170-73 (2012) (rejecting an agency's interpretation on grounds that it defied statutory language and purposes of statutory provisions); *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 401-02 (2008) (rejecting an interpretation of a regulation because it would be in tension with structure and purposes of authorizing statute); *Coke*, 551 U.S. at 169-70 (invoking congressional intent as a basis for resolving conflict between literal readings of two regulations); *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 108-09 (1995) (O'Connor, J., dissenting) (refusing to defer to the Secretary's interpretation because it would force the Court "to conclude that [the Secretary] has not fulfilled her statutory duty").

³⁵ *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 699 (1991) (deferring to the Secretary's interpretation, as the same "position has been faithfully advanced by each Secretary since the regulations were promulgated"); *Mullins Coal Co. v. Dir., Office of Workers' Comp. Programs*, 484 U.S. 135, 159 (1987) (granting deference and noting that the agency's interpretation "has been, with one exception, consistently maintained through Board decisions"); *Udall v. Tallman*, 380 U.S. 1, 4 (1965) (deferring to the agency and noting that "[s]ince their promulgation, the Secretary has consistently construed both orders not to bar oil and gas leases").

³⁶ See, *e.g.*, *Gardebring*, 485 U.S. at 428 n.14 (drawing an inference that term "recipient" includes first-time "applicants" for benefits despite the change in language from "applicant or recipient" in proposed regulation to "applicant" in final regulation on the ground that "recipient" was "inadvertently omitted" (emphasis omitted)).

³⁷ See, *e.g.*, *SmithKline Beecham*, 132 S. Ct. at 2171; *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2263 (2011); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 287-91 (2009) (invoking an agency's statement of basis and purpose to reject claimed inconsistency between agency's actions with its regulations).

pause to justify its reliance on one method or another, or to distinguish the case at hand from prior decisions that invoked different interpretive tools. Indeed, in the Court's *Seminole Rock* line of decisions, it is difficult to discern any attention, much less careful consideration, of the method of regulatory interpretation.

Seminole Rock has gradually acquired a cluster of academic and judicial critics. These criticisms have largely focused on grounds other than the Supreme Court's ad hoc approach to regulatory interpretation under the doctrine. An appropriate place to start is with Professor Robert Anthony, who was one of the first to press the point that *Seminole Rock* rested uncomfortably alongside the APA's provision on the scope of judicial review, enacted two years after *Seminole Rock* was decided.³⁸ Section 706 of the APA provides that the reviewing court "shall decide all relevant questions of law . . . and *determine the meaning or applicability of the terms of an agency action.*"³⁹ Professor Anthony urged that this provision of the APA "manifestly was to arm affected persons with recourse to an independent judicial interpreter of the agency's legislative act, where, after all, the agency is often an adverse party."⁴⁰ The structure of this Section lends some support for this interpretation.⁴¹ Section 706 expressly provides for deferential review in other respects—as to review of facts and the exercise of discretion⁴²—but not as to legal interpretation.⁴³ In addition, Section 706 places the interpretation of agency action on the same footing as constitutional interpretation,⁴⁴ and courts do not generally defer to agencies' interpretation of the Constitution. The legislative history of the APA also offers some support.⁴⁵

The Supreme Court, however, has not shown particular interest in the text of the APA when elaborating the standard of review applicable to agency action (as opposed to review of agency action for compliance with the APA's procedural requirements, where the Court has shown more interest in the APA's text).⁴⁶ The *Chevron* doctrine rests with a small toehold of

³⁸ Pub. L. No. 79-404, 60 Stat. 237, § 10(e) (1946).

³⁹ 5 U.S.C. § 706 (2012) (emphasis added).

⁴⁰ See Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L. J. 1, 9 (1996); see also Stack, *Interpreting Regulations*, *supra* note 21, at 376-77 (noting this neglect of the APA).

⁴¹ John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEXAS L. REV. 113, 193-94 (1998).

⁴² 5 U.S.C. § 706.

⁴³ Duffy, *supra* note 41, at 194.

⁴⁴ *Id.*

⁴⁵ *Id.* at 193-94.

⁴⁶ See Kevin M. Stack, *The Statutory Fiction of Judicial Review of Administrative Action in the United States*, in EFFECTIVE JUDICIAL REVIEW: A CORNERSTONE OF GOOD GOVERNANCE 317, 318-22 (Christopher Forsyth et al. eds. 2010) (arguing that hard look and *Chevron* doctrines have a tenuous connection to the APA's text); Jack M. Beerermann, *End the Failed Chevron Experiment Now: How*

the text of the APA, and the Court's elaboration of the arbitrary and capricious standard proceeds largely in a common law vein with little concern for tying the doctrine to the statute.⁴⁷ Perhaps for this reason, Professor Anthony's challenge to *Seminole Rock* on the basis of the APA has not made much headway before the Court.

The criticism of the *Seminole Rock/Auer* doctrine that has gained the most support on the Supreme Court is the argument that the doctrine provides no disincentive for agencies to promulgate vague regulations in part because the doctrine allows agencies to obtain deference to their own interpretation of those vague regulations. The four-justice dissenting opinion authored by Justice Clarence Thomas in *Thomas Jefferson University Hospital v. Shalala*⁴⁸ is a fount for this critique. There, Justice Thomas argued that accepting an agency's construction of a "hopelessly vague regulation" undermined the purpose of delegation, which is to "resol[ve] . . . ambiguity in a statutory text"⁴⁹ by issuing rules that are "clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law."⁵⁰ Professors Anthony and John Manning elaborated this line of argument.⁵¹ As Professor Manning encapsulates this criticism, *Seminole Rock* presents an increased risk of agencies issuing vague regulations because when the agency chooses to adopt vague terms, "it does so knowing that a court will have no basis for disturbing the agency's interpretation of empty regulatory terms."⁵² Justice Scalia has embraced this line of reasoning.⁵³

Chevron Has Failed and Why It Can and Should Be Overruled, 42 CONN. L. REV. 779, 788-91 (2010) (arguing *Chevron* is inconsistent with the APA); Duffy, *supra* note 41, at 118 (noting tension between APA's text and *Chevron*); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 509 (2010) (arguing that elaboration of hard look and *Chevron* standards of review are common law, as opposed to statutory, in character); *see generally* Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 892-900 (2007) (identifying several doctrines that substantially exceed APA § 553's text). The Supreme Court enforced the text of the APA more closely when lower courts have imposed procedural requirements beyond the minimum required by the APA. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206-07 (2015) ("Time and again, we have reiterated that the APA 'sets forth the full extent of judicial authority to review executive agency action for procedural correctness.'" (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009))).

⁴⁷ *See* Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1299-1300 (2012).

⁴⁸ 512 U.S. 518, 526 (1994) (Thomas, J., dissenting).

⁴⁹ *Id.* at 525 (alteration in original) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991)) (second internal quotation marks omitted).

⁵⁰ *Id.* at 525.

⁵¹ Manning, *Constitutional Structure*, *supra* note 18, at 659-60.

⁵² *Id.*

⁵³ *See Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part) ("*Auer* deference encourages agencies to be 'vague in framing regulations, with the plan of issuing 'interpretations' to create the intended new law without observance of notice and

This pragmatic concern about the incentives and rewards the doctrine creates for agencies is frequently accompanied by a broader separation of powers concern. For Justice Scalia and others writing in this context, Montesquieu is often invoked for the principle that “[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.”⁵⁴ The Constitution’s design reflects that inspiration in many respects. The particular thrust of the concern with regard to *Seminole Rock/Auer* is that the doctrine augments the potential for abuse incident to the consolidation of power in a single institution: the agency.

The spirit of these general critiques of *Seminole Rock*, as well as the thrust of the more specific arguments that its scope needs to be limited to match that of *Chevron*,⁵⁵ finds most prominent expression in the Supreme Court’s 2012 decision in *SmithKline Beecham*. In *SmithKline Beecham*, the Court declined to apply *Seminole Rock/Auer* deference to the Department of Labor’s interpretation of its own regulations in a litigation brief, despite having recently deferred to agency views expressed in amicus briefs.⁵⁶ The specific question before the Court was whether pharmaceutical sales representatives qualified as “outside salesm[e]n,” under the Fair Labor Standards Act (“FLSA”) as it is administered by the Department of Labor.⁵⁷ The Department of Labor had defined the statutory term “outside salesman” in its regulations as “any employee . . . [w]hose primary duty is . . . making sales within the meaning of” the FLSA.⁵⁸ Its regulations also stated that “[s]ales within the meaning of [the statute] include the transfer of title to tangible

comment procedures” (quoting Anthony, *supra* note 40, at 11-12)); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (“[D]eferring to an agency’s interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.”).

⁵⁴ See, e.g., *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part) (quoting a passage from MONTESQUIEU, *SPIRIT OF THE LAWS* bk. XI, ch. 6, at 151-52 (O. Piest ed., T. Nugent trans., 1949)); *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring) (quoting same passage); Manning, *Constitutional Structure*, *supra* note 18, at 645 (quoting same passage).

⁵⁵ See scholars cited in *supra* note 15.

⁵⁶ In 2011, the Court twice concluded that agency amicus briefs qualify for *Seminole Rock* deference, rejecting the argument that under *Mead* and *Christensen* they should not. See *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567, 2575 n.3 (2011) (relying on the brief of the United States); *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 883-84 (2011) (rejecting the argument that an agency amicus brief was not entitled to deference under *Auer*, and according deference to the interpretation contained in the brief).

⁵⁷ *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2161 (2012) (alteration in original) (internal quotation marks omitted).

⁵⁸ *Id.* at 2162 (alteration in original) (quoting 29 C.F.R. § 541.500 (2004)) (internal quotation marks omitted).

property.”⁵⁹ In the preamble to the regulations, the department stressed that the “outside salesman” exception applies whenever an employee “in some sense make[s] a sale,”⁶⁰ and should not depend on technicalities such as whether the employee “types the order into a computer system and hits the return button.”⁶¹

For many years, the Department of Labor had considered pharmaceutical sales representatives to be “outside salesmen” under the regulations, a view that is both permissible under the text of the regulation and supported by the department’s statement in the regulation’s preamble that even those who “‘in some sense’ make a sale” should be considered outside salesmen.⁶² In the litigation at issue, the Department of Labor changed course; in a sequence of amicus briefs in pending cases, it took the position that pharmaceutical sales representatives were not outside salesmen.⁶³ The Court rejected the argument that it must defer to the department’s new position on fair notice grounds: “To defer to the agency’s interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’”⁶⁴ The Court went on to note that to defer in this case would “result in precisely the kind of ‘unfair surprise’ against which our cases have long warned.”⁶⁵ The Court invoked a bedrock principle of notice, for which *NLRB v. Bell Aerospace Co.*⁶⁶ provides a classic articulation: an agency should not be permitted to change the interpretation in an adjudicative proceeding where doing so imposes “new liability . . . on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements.”⁶⁷ The Court concluded that deferring to the Department of Labor’s position in its amicus brief would raise precisely these fair notice problems.⁶⁸ The text of the regulations, the Court reasoned, does not give “clear notice” that the kind of selling in which pharmaceutical representatives engage falls outside of the definition of sales.⁶⁹ Moreover, the Court noted that the agency’s prior guidance in its preamble, which explained that

⁵⁹ *Id.* (first alteration in original) (quoting 29 C.F.R. § 541.503) (internal quotation marks omitted).

⁶⁰ *Id.* (alteration in original) (quoting Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,162 (Apr. 23, 2004)) (internal quotation marks omitted).

⁶¹ *Id.* (quoting 69 Fed. Reg. at 22,163) (internal quotation marks omitted).

⁶² *Id.* at 2165.

⁶³ *SmithKline Beecham*, 132 S. Ct. at 2165.

⁶⁴ *Id.* at 2167 (alteration in original) (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm’n*, 790 F.2d 154, 156 (D.C. Cir. 1986)).

⁶⁵ *Id.* (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007)).

⁶⁶ 416 U.S. 267 (1974).

⁶⁷ *Id.* at 295; see also *SmithKline Beecham*, 132 S. Ct. at 2167 (quoting same).

⁶⁸ *SmithKline Beecham*, 132 S. Ct. at 2167.

⁶⁹ *Id.*

the employee must “in some sense” make a sale, supported this conclusion.⁷⁰

In light of *SmithKline Beecham*, it seems very plausible that the Court would, in an appropriate case, eliminate the disjuncture between the scope of *Chevron* and *Seminole Rock*’s application by limiting *Seminole Rock* to agency actions that would qualify for *Chevron* deference under *Mead*. That would eliminate deference to agency briefs under *Seminole Rock*, but presumably preserve it for agency decisions rendered in formal adjudications. Or, perhaps, Justice Scalia will be able to persuade his fellow justices to eliminate the doctrine root-and-branch.

II. A PROBLEM WITH TWO DIMENSIONS

What has been largely overlooked in this debate over *Seminole Rock* is the importance of the reviewing court’s approach to interpreting the regulation at issue—a question that will be all the more front-and-center if the Court does abandon the doctrine. The extent of deference to agencies’ interpretations of their own regulations, and the incentives that it creates for agencies, does not only depend on the standard of review the court applies. Rather, the overall framework for judicial review includes the interpretive approach the court adopts when it interprets the regulations. The interpretive approach is how the court determines what constitutes the best or the range of permissible reading of the regulation—say, by reading the regulatory text alone, the text in light of canons of construction, the agency’s justifications for it, and so on.

The point that the interpretive approach matters to how a standard of review applies is a familiar one in the context of debates over *Chevron*. Perhaps the most well-known and robustly stated position on this relationship is the following comment from Justice Scalia:

In my experience, there is a fairly close correlation between the degree to which a person is (for want of a better word) a “strict constructionist” of statutes, and the degree to which that person favors *Chevron* and is willing to give it broad scope. The reason is obvious. One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt. Contrariwise, one who abhors a “plain meaning” rule, and is willing to permit the apparent meaning of a statute

⁷⁰ *Id.* (emphasis omitted) (quoting Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,162 (Apr. 23, 2004)) (internal quotation marks omitted); *see also id.* at 2168 (“It is one thing to expect regulated parties to conform their conduct to an agency’s interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency’s interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.”).

to be impeached by the legislative history, will more frequently find agency-liberating ambiguity, and will discern a much broader range of “reasonable” interpretation that the agency may adopt and to which the courts must pay deference. The frequency with which *Chevron* will require *that* judge to accept an interpretation he thinks wrong is infinitely greater.⁷¹

If Justices Scalia’s premises are correct, a textualist applying a deferential standard of review may end up deferring to the agency less often than an intentionalist applying *de novo* review, and thus the choice of interpretive method trumps (or at least substantially mitigates) the choice of standard. Whether or not one agrees with Justice Scalia’s position that textualists in statutory interpretation will need to defer less often under *Chevron* than those who look to legislative history,⁷² the more general point is that the interpretive approach the court adopts influences the operation of the standard of review.

That general point has intuitive appeal, but does it have any empirical support? Empirical studies have not tested the relative influence of interpretive methodology under *Seminole Rock*. Empirical work on *Chevron* and *Skidmore*, however, is suggestive of the influence of interpretive choice within the framework of review. In Professor William Eskridge and Lauren Baer’s comprehensive study of deference regimes on the Supreme Court between 1983 and 2005, they found strikingly close agency win rates under *Chevron* and *Skidmore*, with the agency winning in 76.2 percent of cases under *Chevron*, and 73.5 percent under *Skidmore*.⁷³ This finding throws cold water on the extensive judicial, litigation, and scholarly resources expended on determining whether *Chevron* or *Skidmore* applies. This mere three percent difference between *Chevron*’s “deferential” standard and “the power to persuade” of *Skidmore* suggests that the difference between these standards of review is not doing a great deal of work, at least in the Supreme Court, in determining how frequently agencies win and lose when those standards are invoked.⁷⁴

⁷¹ Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

⁷² In an article close in time to Justice Scalia’s postulation, Professor Merrill suggest that this point is “at best unproven.” See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 370 (1994) (suggesting, based on a study of four Supreme Court terms, that it is difficult to support the claim that the dominant effect of legislative history is to expand range of possible meanings); cf. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008) (discussing the influence of textualism on *Chevron*).

⁷³ Eskridge & Baer, *supra* note 72, at 1142.

⁷⁴ Some studies show a lower win rate for agencies under *Skidmore* in the federal courts of appeals. See, e.g., Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1275 (2007) (showing a 60 percent agency win rate under *Skidmore* in the federal courts of appeals); Amy J. Wildermuth, *Solving the Puzzle of Mead and Christensen: What Would Justice Stevens Do?*, 74 FORDHAM L. REV. 1877, 1896-1905 (2006) (showing lower agency affirmance rate of 39 percent under *Skidmore*).

Eskridge and Baer's other findings, as well as those of a study by Professors Thomas Miles and Cass Sunstein,⁷⁵ suggest the possible influences of Justice's different methods of statutory interpretation. Eskridge and Baer find a greater difference in the agency win rates among the Supreme Court justices than reflected in this overall difference in whether *Chevron* or *Skidmore* applies.⁷⁶ They report, for instance, that the overall agreement rate with the agency for Justice Stephen Breyer is 72 percent, while Justice Ruth Bader Ginsburg is 69.5 percent, Justice Scalia is 64.5 percent, Justice Thomas is 63.1 percent, and Justice John Paul Stevens is 60.9 percent.⁷⁷

Specifically testing the agency affirmance rates when *Chevron* is invoked, Miles and Sunstein found that Justice Breyer's affirmance rate is 81.8 percent, while Justice Ginsburg is 74.0 percent, Justice Scalia is 52.2 percent and Justice Thomas is 53.6 percent.⁷⁸ Given the different views these justices have about how to interpret statutes—roughly, with Justices Scalia and Thomas favoring textualism, and Justices Breyer and Ginsburg taking legislative history and broader legal context as more relevant—their different views of statutory interpretation may play an important role in explaining their different voting patterns. Miles and Sunstein specifically tested whether adherence to “plain meaning” methodology explains the justices' voting patterns in *Chevron* cases.⁷⁹ Though Miles and Sunstein's empirical tests could not distinguish the influence of interpretive methods from the justices' attitudes toward the bureaucracy and pure political preference,⁸⁰ they find support for Justice's Scalia's prediction that adherents to textualism will defer less often to the agency's position under *Chevron*.⁸¹ And indeed, they show that in *Chevron* cases, Justice Scalia himself is the least likely justice to defer to the agency.⁸²

There are reasons to be cautious about the implications of these findings when considering how much interpretive dimension matters with regard to judging the validity of the agency's interpretations of its own regulations. First, Eskridge and Baer's study reports a higher agency win rate—90.9 percent—under *Seminole Rock*.⁸³ That higher win rate might suggest a greater difference between the *Seminole Rock* and *Skidmore* standards than

⁷⁵ Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 828-829 (2006) (identifying the influence of approach to statutory interpretation under *Chevron* as a “formalist hypothesis” for explaining *Chevron* outcomes).

⁷⁶ Compare Eskridge & Baer, *supra* note 72, at 1099 (showing agency win rate in Supreme Court is 73.5 percent under *Skidmore* and 76.2 percent under *Chevron*), with *id.* at 1054 (showing range 81.3 percent to 52.6 percent agency win rate by Supreme Court justice).

⁷⁷ See Eskridge & Baer, *supra* note 72, at 1154.

⁷⁸ Miles & Sunstein, *supra* note 75, at 832 (tbl. 1, col. 1).

⁷⁹ See *id.* at 831.

⁸⁰ *Id.* at 838.

⁸¹ *Id.*

⁸² See *id.* at 826, 832 (tbl. 1, col. 1).

⁸³ Eskridge & Baer, *supra* note 72, at 1142.

Chevron and *Skidmore*, even though the legal formulation of *Seminole Rock* and *Chevron*'s formulation is quite similar.⁸⁴ Second, it could be that methods for interpreting regulations are less important than methods of statutory interpretation, though it is not clear in principle why that would be the case. Third, even in the detailed studies such as Miles and Sunstein's, it is hard to pull apart the explanatory role of interpretive commitments from other confounding political and ideological influences.

Even with these qualifications, this empirical work is, at the very least, suggestive that the choice of interpretive method matters to how a standard of review operates. Given that a court cannot avoid adopting an interpretive approach when it assesses the validity of an agency's action under the agency's own regulation—whether it does so under *Seminole Rock* or *Skidmore*—there is reason to expand the debate about *Seminole Rock* to include an interpretive dimension.

III. INTERPRETIVE APPROACH: REGULATORY PURPOSIVISM

So what method of interpretation should courts adopt when interpreting regulations under *Seminole Rock* (or under another standard)? Does Justice Scalia's prediction that textualists defer less often to agency interpretations with which they disagree hold when a court is evaluating an agency's interpretation of its own regulations? More generally, which methods of regulatory interpretation will end up being more or less deferential to agencies?

The debate over methods of regulatory interpretation is generations behind that of statutory interpretation and has hardly considered the interpretive dimension of *Seminole Rock*. As a way to start this examination, it makes sense to compare two different approaches to regulatory interpretation—textualism and purposivism. This analysis suggests that regulatory

⁸⁴ Just as *Chevron* requires a court to independently assess whether the agency's interpretation is precluded by the statute, *Seminole Rock* requires a court to independently assess whether the agency's interpretation is plainly erroneous or inconsistent with its regulations. Both doctrines thus involve an element of independent judicial review to determine if the agency's action is permissible, and then deference to the agency's interpretations inside of those parameters. As a result, contrary to a recent suggestion of Justice Thomas, *Seminole Rock* does not (wholly) "preclude[] judges from independently determining" the meaning of the regulation. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1219 (2015) (Thomas, J., concurring). That independent judicial judgment is required under *Seminole Rock* to determine whether the agency's interpretation is inconsistent with the regulation before *Seminole Rock* triggers deference to the agency. Indeed, Justice Thomas allows as much in noting that *Seminole Rock* deference is not absolute, but applies only to interpretations that are plainly erroneous or inconsistent with the regulation. *See id.* (noting this exception). The substantive disagreement, then, is not over whether *Seminole Rock* requires any independent judicial judgment (it does) but over how narrow that independent check is.

purposivism, as defined below, is less deferential to *post hoc* agency interpretations of their own regulations than relying on the text alone whether review is under the *Seminole Rock* standard or a more rigorous one such as *Skidmore*. This approach to regulatory interpretation also has the prospect of providing greater notice of a regulation's meaning than relying on the regulation's text alone.

A. *Methods Defined*

Over the last decade, the debate over statutory interpretation has gradually resolved into a debate between textualism and purposivism.⁸⁵ These two contrasting methodological approaches provide a good point of comparison for evaluating regulatory interpretation.⁸⁶

Textualism understands the interpreter's goal is to ascertain a reasonable public meaning of the text.⁸⁷ With regard to statutes, textualists argue that legislation frequently lacks an agreed-upon purpose, and therefore it does not make sense for a judge to interpret legislation in light of purposes other than those discernible from or expressed in the enacted text—that is, those “a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”⁸⁸ Textualists further contend that a method of statutory interpretation that makes discerning the purpose of a statute a central feature does not provide an attractive account of the judicial role.⁸⁹ Moreover, at a practical level, textualists object that even if legislative purpose were a coherent idea in statutory interpretation, it is extremely difficult to discern. As a result, trying to do so leads to more judicial errors than focusing on the enacted text.⁹⁰

Some textualists eschew relying on legislative intent on the ground that the intent of the lawmakers is not is publically available as a source of notice. In this vein, Justice Scalia writes, “it is simply incompatible with

⁸⁵ See, e.g., John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 75 (2006) (describing the remaining differences between textualism and purposivism); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 25 (2006) (characterizing the same).

⁸⁶ As noted above, Professor Nou's forthcoming article, *Regulatory Textualism*, joins this debate, see *supra* note 21; though timing did not permit discussion of her arguments in this Article, the interested reader will find in Professor Nou's article points of overlap and disagreement on the proper technique of regulatory interpretation as well as on the account of regulatory textualism relevant to the discussion below.

⁸⁷ See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17 (Amy Gutmann ed., 1997); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2410-13 (2003).

⁸⁸ SCALIA, *supra* note 87, at 17.

⁸⁹ See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983).

⁹⁰ See, e.g., ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 112 (2006) (arguing that consulting legislative history increased incidents of judicial error in ways not shared by statutory text).

democratic government, or indeed, even with fair government, to have the meaning of the law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.”⁹¹ On this point, Justice Scalia invokes the Roman emperor Nero, who posted edicts high up on pillars so they could not easily be read.⁹² With regard to regulations, a textualist approach would seek to interpret the regulation based on the text of the regulation itself, as the binding document that constitutes the law, understood against the semantic context of other regulations and related statutes. This view may undergird the Supreme Court’s occasional reference to the plain meaning of the regulations as the interpretive question under *Seminole Rock*.⁹³

The formulation of purposivism for regulations at issue here has two important elements. The first is a commitment to interpreting the regulation in accordance with its text. In this sense, it operates very much the same way as textualism; it seeks to understand the best reading of the text in its semantic context, and thus has much in common with what has been called the new purposivism⁹⁴ or with regard to statutes, a reading that has a strong foundation in Professors Henry Hart and Albert Sacks’s legal process materials.⁹⁵ Second, the reader should check the prospective construction of the regulatory text to see that it accords with the agency’s own public justification and explanation of the regulation provided in the “statement of basis and purpose,”⁹⁶ which forms the bulk of the preamble. Because a regulation issued through notice-and-comment is not procedurally or substantively valid without such a statement,⁹⁷ interpreting a regulation in light of the statement of basis and purpose is not seeking to interpret the regulation through an unexpressed intent. Accordingly, it does not raise the specter of emperor Nero that Justice Scalia invokes. Paying close attention to the preamble is a focus on a public source of justification of the regulation. This approach requires that the interpretation of the regulation be at least consistent with the purposes and other positions the agency has set forth in its exposition for the rule appearing in its statement of basis and purpose. For this regulatory purposivist approach, then, there are two privileged interpre-

⁹¹ SCALIA, *supra* note 87, at 17.

⁹² *Id.*

⁹³ See *supra* notes 27-31 and accompanying text.

⁹⁴ See John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 117 (characterizing a new strain in the Supreme Court’s statutory interpretation cases where the purpose only plays a role if the text is broad enough to permit it).

⁹⁵ See Stack, *Interpreting Regulations*, *supra* note 21, at 385-91 (highlighting the role of enacted purpose and text for Hart and Sacks and foundations of this view in their principle of “institutional settlement”); see also Manning, *supra* note 94, at 117-18 (highlighting institutional settlement’s role for Hart and Sacks and recent judicial decisions reflecting that role).

⁹⁶ 5 U.S.C. § 553(c) (2012).

⁹⁷ See *New Eng. Coal. on Nuclear Pollution v. NRC*, 727 F.2d 1127, 1131 (D.C. Cir. 1984) (to comply with APA § 553(c) “an agency rule must be accompanied by a statement of basis and purpose” to be procedurally valid).

tive sources: the text of the regulation and the justification and explanation of the regulation provided in the statement of basis and purpose,⁹⁸ with the regulatory text governing in case of conflict.

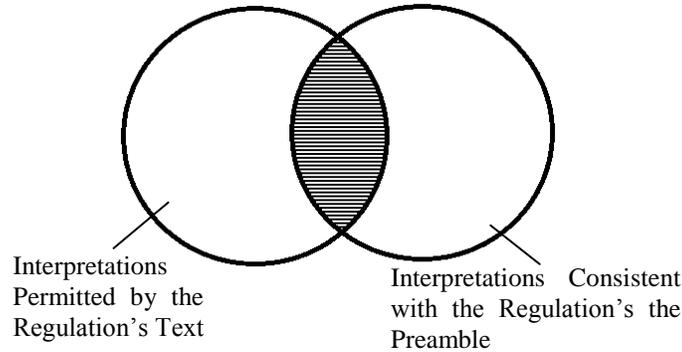
B. *Deference and Range of Acceptable Meanings*

As an interpretive approach, regulatory purposivism results in a narrower range of acceptable or permissible readings of regulations than textualism. This is most easily seen by comparing the two approaches under the deferential *Seminole Rock/Auer* standard. For a court applying this deferential standard of review, the doctrinal question is whether the agency's interpretation is "plainly erroneous or inconsistent with the regulation," that is, whether the agency's interpretation is a permissible one. Now consider how a textualist and a regulatory purposivist address that question. For a textualist, the sole question is whether the agency's interpretation is a permissible reading of the text of the regulation. A regulatory purposivist asks the same question the textualist does about what is permissible under the text, but also adds a separate inquiry as to whether any given construction is consistent with (or carries forward) the justification and explanations for the regulation in the preamble.

In principle, then, the range of permissible interpretations for a purposivist is narrower than for a textualist. One can think of this as two intersecting circles of a Venn diagram, as depicted in Figure 1 below, with one circle representing the textually permissible interpretations, and the other representing interpretations consistent with the regulation's preamble. The textualist will defer to any interpretation that is textually permissible, as represented by those within the left circle. A nontextually constrained purposivist would defer to interpretations in the right circle. In contrast to both of these approaches, a regulatory purposivist will defer only to interpretations in the shaded portion where the two circles overlap. Because the regulatory purposivist approach has an additional requirement for an interpretation to be a permissible one—textual permissibility plus consistency with purposes and other statements in the preamble—a court deploying this approach will find a narrower set of interpretations consistent with the regulations under *Seminole Rock* than a court applying a textualist approach. As a result, when a court employs a regulatory purposivist approach under *Seminole Rock*, the agency has less flexibility in interpreting its own regulations than it would under a textualist approach.

⁹⁸ See Stack, *Interpreting Regulations*, *supra* note 21, at 398.

Figure 1



This result is not limited to a court applying *Seminole Rock*. Even if the court were applying a *Skidmore* or de novo standard of review, the regulatory purposivist method would identify a narrower set of readings acceptable than a textualist method would. If the text of the regulation is clear, there should be no difference between the two approaches; both will follow the clear meaning of the regulation's text. But with regard to ambiguous regulations, the regulatory purposivist approach should result in the court deferring to an agency's ex post interpretation of the regulation less often than a textualist approach. The reason runs parallel to the one above: if the regulation's text is ambiguous, a court looking for a reading that makes the most sense of the regulation's text and the commitments the agency made in its preamble should end up finding a narrower range of agency interpretations convincing. The additional requirement of interpreting the ambiguous regulatory text in light of the preamble constrains, at least in principle, the scope of interpretations allowed by ambiguous regulatory text. Accordingly, a regulatory purposivist should be less deferential under *Skidmore* to an agency's later issued interpretations than a textualist because a narrower range of interpretations will be acceptable to the regulatory purposivist.

Whether applied under *Seminole Rock* or *Skidmore*, this textually constrained purposivist approach effectively uses the agency's prior commitments in the preamble to limit the scope of its later interpretation. As a result, this method grants less deference than textualism to the agency's later issued interpretations, but does so by granting a greater interpretive role than textualism would to the agency's contemporaneous justification of its regulations appearing in regulatory preambles.

C. *Predictability*

An interpretive approach that identifies a narrower range of acceptable meanings may augment notice of the meaning; a relatively small set of acceptable meanings reduces uncertainty for the regulated. Still, an approach that identifies a narrower range of acceptable meanings does no good if no one can figure out what they are. To provide greater notice, an interpretive approach must have a claim to producing results that are more predictable to the relevant audience, not just specifying a narrower range of permissible meanings.

Because regulatory purposivism relies on the examination of extra-textual sources—the statement of basis and purpose included in the regulation’s preamble—as part of the interpretive method, it has a special burden to overcome with regard to predictability. A common criticism of statutory interpretation methods that rely on consulting legislative history, for instance, is that they lead to more frequent judicial errors, and thus less predictability. From this perspective, consulting extra-textual sources confounds predictability as opposed to augmenting it.

Several distinctive legal features of regulations suggest that the enterprise of gaining guidance from a regulatory preamble promises more predictability than working with legislative history. Unlike statutes, the validity of regulations depends upon their being issued with a “statement of their basis and purpose,”⁹⁹ which explains the grounds and purposes of the regulations in light of statutory objectives.¹⁰⁰ Regulations are not procedurally valid unless they include this accompanying statement.¹⁰¹ Further, under well-established doctrines of administrative law, the substantive validity of regulations is also judged on the basis of these statements.¹⁰² This way in which the text of a regulation and the statement of basis and purpose are bound up together—a rule’s validity depends upon its statement—

⁹⁹ See 5 U.S.C. § 553(c) (requiring the agency to issue a “statement of their basis and purpose”). See also H.R. REP. NO. 79-1980, at 259 (1946), reprinted in ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 225 (2d Sess. 1946). The Senate Document contains as an appendix the Attorney General’s 1945 report on Senate Bill 7. The Attorney General’s report stated the following in regards to the statement of basis and purpose:

Section 4 (b), in requiring the publication of a concise general statement of the basis and purpose of rules made without formal hearing, is not intended to require an elaborate analysis of rules or of the detailed considerations upon which they are based but is designed to enable the public to obtain a general idea of the purpose of, and a statement of the basic justification for, the rules. The requirement would also serve much the same function as the whereas clauses which are now customarily found in the preambles of Executive orders.

Id.

¹⁰⁰ *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 852 (D.C. Cir. 1987).

¹⁰¹ *Id.*

¹⁰² See Stack, *Interpreting Regulations*, *supra* note 21, at 379 (explaining rule of these statements in substantive review of agency regulations).

strengthens the grounds for reading the rule in light of the explanatory statement.

In addition, at a practical level, the statement of basis and purpose facilitates its use by courts and the public in a way that is not true of legislative history. First, legislative history includes multiple types of sources (e.g., committee reports, floor statements, etc.), from multiple different voices, over extended periods of time. Each part of the legislative history represents the views of only a subpart of the legislature. In contrast, preambles are issued on behalf of the agency itself, not a subgroup within it; they constitute authoritative guidance about the agency's understanding of the meaning of the regulations at the time they are issued. This message comes through clearly in the *Attorney General's Manual on the Administrative Procedure Act*.¹⁰³ Of the statement of basis and purpose, the Manual opines, "[t]he required statement will be important in that the courts and the public may be expected to use such statements in the interpretation of the agency's rules."¹⁰⁴ Moreover, because the validity of the rule depends upon the quality of the agency's reasoning in these statements, in general, they are carefully crafted, highly organized documents, issued in a single voice.¹⁰⁵ In short, discerning guidance from preambles about the meaning of the regulations is more practical than using the multiple sources of legislative history in statutory interpretation.

Suppose, then, that consulting regulatory preambles is not subject to the same practical objections levied against legislative history. That leaves us with the difficult question of whether it is easier to predict how the meaning of an ambiguous regulation will be fixed by, on the one hand, consulting the regulation's preamble as a privileged source for limiting its scope, or, on the other hand, redoubling efforts at affixing meaning from the regulatory text alone. As opposed to addressing this point abstractly, let's turn to an example to suggest the promise of preambles to narrow ambiguous regulatory language in a predictable way.

D. *No Drones in the Park?*

The most famous hypothetical for teasing apart the difference between textualism and more purpose-based forms of interpretation is Professors H.L.A. Hart and Lon Fuller's debate over the application of a "no vehicles

¹⁰³ U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 32 (1947).

¹⁰⁴ *Id.*

¹⁰⁵ The Administrative Conference of the United States recently issued a recommendation that recognized the guidance function of preambles and proposed a set of best practices for agencies in the drafting of preambles to facilitate that function. *See* Adoption of Recommendations, 79 Fed. Reg. 35,988, 35,992 (June 25, 2014). The author of this Article was the consultant to the Conference on this project.

in the park” prohibition.¹⁰⁶ Current technology has turned up a new iteration of this hypothetical for the age of regulatory interpretation: are unmanned aircraft allowed in the national parks?

This summer the National Park Service (“NPS”) issued a Policy Memorandum to the superintendents of the National Parks to prohibit the flying of drones in their parks.¹⁰⁷ The memorandum advised the superintendents to invoke their authority under a provision of the NPS regulations that authorizes the superintendents to impose limitations on the use of the parks based on a finding that such a limit is necessary for “maintenance of public health and safety, protection of environmental or scenic values”¹⁰⁸ among other values, so long as those limits are “[c]onsistent with applicable legislation and Federal administrative policies.”¹⁰⁹ This memorandum stated that the park superintendents should invoke this emergency authority “[b]ecause the existing NPS regulations can only be used to address unmanned aircraft in certain circumstances.”¹¹⁰ One might ask, then, whether prohibiting drones on this basis is consistent with other NPS regulations?

The NPS regulations concerning aircraft and air delivery prohibit “[o]perating or using aircraft on lands or waters other than at locations designated pursuant to special regulations” as well as “[d]elivering or retrieving a person or object by parachute, helicopter, or other airborne means, except in emergencies involving public safety or serious property loss, or pursuant to the terms and conditions of a permit.”¹¹¹ The regulations define “aircraft” as “a device that is used or intended to be used for human flight in the air, including powerless flight.”¹¹² Because the drones in question are not used for human flight, the principal question, then, is whether a drone would constitute the “delivering . . . [of an] object by . . . airborne means.”¹¹³

Based on the text of the NPS regulations alone, one could make credible arguments either way. On the one hand, the word “delivery” suggests transport of something other than the means of airborne propulsion itself. On the other hand, the person controlling the drone might be thought to be

¹⁰⁶ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607-11 (1958); see also Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1109-10 (2008) (discussing the debate surrounding this most famous hypothetical).

¹⁰⁷ See Memorandum from Jonathan B. Jarvis, Dir., Nat’l Park Serv., to Reg’l Dirs. & Superintendents, Policy Memorandum 14-05 (June 19, 2014) [hereinafter Jarvis Memorandum], available at www.nps.gov/policy/PolMemos/PM_14-05.htm.

¹⁰⁸ 36 C.F.R. § 1.5 (2013).

¹⁰⁹ *Id.*

¹¹⁰ Jarvis Memorandum, *supra* note 107.

¹¹¹ 36 C.F.R. § 2.17.

¹¹² 36 C.F.R. § 1.4.

¹¹³ 36 C.F.R. § 2.17.

“delivering” the drone itself, a position taken by at least one of the parks.¹¹⁴ Perhaps textualist ingenuity might find one or the other of these readings more persuasive based on the text alone, or its surrounding semantic context. But that is in part the point; with a constrained set of tools, the textualist is forced to a moment of creative ingenuity,¹¹⁵ which does not bode particularly well for the predictability of results. Now consider the preamble to the regulations. The preamble includes the following statement: “This regulation limits the operation and use of aircraft to designated areas and generally prohibits the air delivery of persons or property.”¹¹⁶ This statement provides solid support for the idea that the prohibition is on the depositing of something tangible, whether it is persons or property. Faced with a choice between making textual inferences alone or bringing in this part of the agency’s own articulated explanation of the scope of the regulation, consulting the preamble gives the interpreter a more sure-footed basis for a conclusion. This is not to say that every preamble provides a helpful basis to ensure that the agency’s interpretation is consistent with the agency’s original understanding, but many do.¹¹⁷

What this stylized example suggests is that insisting that an agency’s interpretation is consistent with the positions it took in the preamble reduces the range of acceptable interpretations in a way accessible to the audience to whom the regulations apply. As opposed to inviting creative textual inferences, this approach offers something more quotidian, parsing the regulatory text in relation to the preamble. In that, it has a claim to offering more predictable interpretation.

E. *Systematic Effects and Objections*

A regulatory purposivism approach of this kind treats the agency’s justification for a regulation as something more than an elaborate nuisance necessary for the regulations to survive judicial challenge; it treats that reason-giving exercise as creating commitments to the scope of application of the regulation. Treating preambles in this way augments the extent to which litigants and the public can use them as a source of guidance about the

¹¹⁴ See *Use of Unmanned Aircraft Systems (Drones) Prohibited in Yosemite National Park*, NAT’L PARK SERV. (May 2, 2014), <http://www.nps.gov/yose/parknews/use-of-unmanned-aircraft-systems-drones-prohibited-in-yosemite-national-park.htm> (invoking 36 C.F.R. § 2.17 to justify the prohibition).

¹¹⁵ See Merrill, *supra* note 72, at 373 (stating that with fewer interpretive tools the textualist “has to become more imaginative”).

¹¹⁶ 48 Fed. Reg. 30,268 (June 30, 1983).

¹¹⁷ See KEVIN M. STACK, GUIDANCE IN THE RULEMAKING PROCESS: EVALUATING PREAMBLES, REGULATORY TEXT, AND FREESTANDING DOCUMENTS AS VEHICLES FOR REGULATORY GUIDANCE 34 (2014), available at <http://www.acus.gov/report/final-guidance-rulemaking-process-evaluating-preambles-regulatory-text-and-freestanding> (report prepared for the Administrative Conference of the United States) (suggesting that agencies generally provided a detailed justifications for their rules).

proper construction of the regulation, and consistent with their guidance function.¹¹⁸ As a result, it would reduce agency flexibility to interpret their regulations in ways that may be plausible under the regulation's text but inconsistent with the policies the agency posited as justifying the regulations. That reduced flexibility, however, would directly serve the value of fair notice because it would allow the public to rely on the agency's reasons for its regulations as a source of guidance.

Some might object that this approach gives agencies divergent and undesirable incentives. On the one hand, it might be seen as giving agencies incentives to say as little as possible in their preambles to reduce the scope of interpretive constraint that their preambles create. The relatively demanding scope of hard look review, however, gives agencies strong countervailing incentives to carefully rationalize their regulations or face judicial reversal. Because those rationalizations are necessary for regulations to survive judicial review, those incentives to provide detailed explanations likely overwhelm the agency's interest in preserving interpretive flexibility. Hard look review, in other words, provides a baseline requirement of relatively elaborate reason-giving, reasons to which the agency can be held in future interpretation of its regulations.

On the other hand, this approach might be viewed as giving agencies incentives to load their preambles with policy statements about their regulations that they were not able—for political reasons, or otherwise—to include in the regulatory text. Here it is important to recall that statements in which the agency purports to bind must appear in the regulatory text;¹¹⁹ preambles are not binding but merely guidance about the meaning of the text. As a result, a court will not treat the text of a preamble as creating binding obligation,¹²⁰ and the agency will have to adopt regulatory text to

¹¹⁸ See *Adoption of Recommendations*, 79 Fed. Reg. 35,988, 35,992 (June 25, 2014) (noting the guidance function of preambles).

¹¹⁹ STACK, *supra* note 117, at 23 (“As a matter of blackletter law, under APA § 553, a ‘legislative’ rule must be subject to notice-and-comment whereas interpretative statements and general statements of policy are not. Thus, if a preamble or guidance document includes a statement that is a legislative rule, the rule is procedurally invalid under section 553.” (footnote omitted)).

¹²⁰ While language in preambles is not occasionally challenged as improper legislative rules, courts have generally held that statements in preambles are interpretive rules or general statements of policy, and thus procedurally valid. See, e.g., *Troy Corp. v. Browner*, 120 F.3d 277, 287 (D.C. Cir. 1997) (EPA’s preambular statement “merely informed the public that the agency would exercise its discretion by considering exposure only for low toxicity chemicals” and thus was a general policy statement); *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1308-09 (D.C. Cir. 1991) (holding that the EPA’s rule in its preamble was interpretive because it “represents the agency’s attempt to interpret the meaning of a statutory provision”); *Comité de Apoyo a los Trabajadores Agrícolas v. Solis*, No. 09-240, 2010 U.S. Dist. LEXIS 90155, at *47 (E.D. Pa. Aug. 30, 2010) (holding that the preambular language was an interpretation because the language was “tied very closely” to the definition included in the regulation and “expressly purports to be an interpretation of that definition”); *Barrick Goldstrike Mines, Inc. v. Whitman*, 260 F. Supp. 2d 28, 38 (D.D.C. 2003) (“In this case, the interpretation [contained within the preamble] . . . is within the scope of the regulation”); *Bd. of Trustees of Knox Cnty. Hosp. v.*

bind the public. That reduces the utility of the preamble to provide an end-run around having to include the statements in regulatory text. Moreover, it is not clear what harm there is in an agency providing a very elaborate preamble. Indeed, the more detailed the preamble the greater interpretive constraint it imposes on the agency, at least under a regulatory purposivism approach.

These arguments suggest that regulatory purposivism is less deferential than textualism when applied in reviewing the validity of agency's *post hoc* interpretations of their regulations. Effectively the added constraint this approach provides derives from accepting (or deferring) to the agency's original justifications for its regulations, but being less deferential to subsequent agency interpretations that are not consistent with those original justifications. That provides grounds to suggest that, with regard to ambiguous texts, regulatory purposivism also provides greater notice to the regulated by identifying a narrower range of acceptable meanings and is arguably more predictable than a textualist approach.

This is not a complete defense of regulatory purposivism as an approach to regulatory interpretation. One could still ask how this approach fares with regard to other values, such as the deference rationale of *Chevron*,¹²¹ and background principles of political accountability. Nor does this interpretive approach directly address the incentives *Seminole Rock* may provide agencies to issue vague regulations. But hopefully it is suggestive of the fair notice and predictability gains of interpreting the text of regulations in light of their preambles.

CONCLUSION

The debate over the merits of *Seminole Rock* and *Auer* for review of agency interpretations of their own regulations has proceeded on familiar lines. Critics have challenged the doctrine's consistency with rule-of-law

Shalala, 959 F. Supp. 1026, 1031 (S.D. Ind. 1997) ("Rather than create or destroy substantive rights, the [preambular] policy simply clarifies what the Secretary believes the regulation means and explains how the Agency will apply it."); *OSG Bulk Ships, Inc. v. United States*, 921 F. Supp. 812, 824 n.11 (D.D.C. 1996) (explaining that an interpretation within the preamble does not transform the preamble into a legislative rule). See also STACK, *supra* note 117, at 24 n.133.

¹²¹ See Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 132 (2000) (arguing that the entity that controls the meaning of the regulation has effective control over the meaning of the statute, and as a result, *Seminole Rock* deference is required to implement the delegation of interpretive authority over the statute to the agency recognized by *Chevron*); Melanie E. Walker, Comment, *Congressional Intent and Deference to Agency Interpretations of Regulations*, 66 U. CHI. L. REV. 1341, 1342 (1999) (arguing that delegation of interpretive authority to an agency under *Chevron* also involves *Seminole Rock*-style deference to an agency's interpretation of its own regulations).

values and separation of powers; others have shown that the doctrine has expanded well beyond its origins. But this debate has not attended to the threshold issue implicated in *Seminole Rock/Auer* and under any standard addressing review of agency interpretation of their own regulations—the method of regulatory interpretation. Focusing on how the courts construe the regulation reveals that the method of interpretation may make as much difference to the outcome of review, and values underlying the debate over *Seminole Rock/Auer*, as whether the Court continues to apply the *Seminole Rock/Auer* doctrine or adopts a less deferential standard of review. In particular, an approach to interpreting regulations that insists on consistency with the regulation’s text and the commitments the agency made in its preamble constrains the agency to a narrower set of possible meanings than looking to the text alone. That does not tell us whether the Court should retain or abandon the *Seminole Rock/Auer* doctrine, but it does suggest that the interpretive approaches make a difference to when that standard results in deference to the agency.